

STATE OF MICHIGAN
COURT OF APPEALS

BOARD OF WASHTENAW COUNTY ROAD
COMMISSIONERS,

UNPUBLISHED
September 19, 2013

Plaintiff-Appellee,

v

No. 304525
Washtenaw Circuit Court
LC No. 09-000091-CK

LINCOLN CONSOLIDATED SCHOOL
DISTRICT,

Defendant-Appellant,

and

BELLEMEADE INVESTMENT COMPANY,
LLC,

Defendant.

Before: CAVANAGH, P.J., and K. F. KELLY and FORT HOOD, JJ.

PER CURIAM.

Defendant, Lincoln Consolidated School District, appeals as of right a judgment in favor of plaintiff, Board of Washtenaw County Road Commissioners, following a bench trial in this breach of contract and declaratory judgment action.¹ We vacate the judgment and remand for entry of judgment in defendant's favor consistent with this opinion.

Plaintiff filed this breach of contract claim and request for declaratory relief after defendant failed to commit to funding improvements to Willis Road necessitated by defendant's plan to expand its school campus.² The contract was a Road Improvement Agreement

¹ Bellemeade Investment Co, LLC (Bellemeade) also filed an appeal but it was dismissed by this Court's order entered June 6, 2013, following the parties' stipulation for voluntary dismissal. Therefore, this opinion's reference to "defendant" refers to Lincoln Consolidated School District.

² Because of declining enrollment, some of defendant's planned improvements were never accomplished, including the construction of a new high school.

(Agreement). The Agreement was entered into on August 11, 2003, by plaintiff, defendant, and Bellemeade, which was also developing property along Willis Road. The Agreement set forth the specified improvements to Willis Road as: “all required dedicated right turn and left turn lanes, associated lane tapers to transition from the existing roadway and deceleration and acceleration tapers,” and the “replacement of the existing short span bridge servicing the McCarthy Drain.” The Agreement provided that plaintiff would perform the road improvements and would pay 75 percent of the cost associated with replacing the short span bridge with a culvert, as well as contribute \$25,000 toward the cost of the project. Defendant and Bellemeade would pay the remainder of the actual costs, which would be divided equally.

The Agreement stated that the estimated cost of the road improvements was \$473,000, but also provided that defendant and Bellemeade “shall be obligated to pay for the actual cost of the Willis Road Improvements . . . regardless of whether such cost exceeds the foregoing estimate.” Defendant’s estimated share of the total cost was \$149,000, and plaintiff’s estimated share of the total cost was \$175,000. Plaintiff was also to be paid a fee for the administration of the project, which was to be calculated at 15 percent of the contract price for the improvements. With regard to the timing of the project, the Agreement stated: “It is anticipated that engineering work will be bid and performed within twelve months of the date of this Agreement, and that construction work will be bid and performed the following year.” It also provided: “The WCRC agrees to complete the Willis Road Improvements and within three (3) years of execution of this Agreement.” The Agreement also included time of the essence and written modification provisions.

Plaintiff did not begin the road improvement project until August 2005, two years later than “anticipated” by the Agreement. At that time, plaintiff’s project manager, Mark McCulloch, drafted a request for proposal (RFP) to solicit bids from engineering consultants for the design work. The RFP included the addition of a length of road not set forth in the Agreement, but the issue was eventually resolved. Other issues that arose included: (1) a dispute with a utility company regarding the relocation of power poles, which was resolved in July 2006; (2) a dispute with the Drain Commissioner regarding the installation of a detention basin, which was resolved in June 2006; and (3) a delay in acquiring necessary right-of-ways.

The engineer’s cost estimates for the project also caused an issue between the parties because the estimated cost was substantially higher for Bellemeade and defendant, but significantly lower for plaintiff, as compared to the estimates set forth in the Agreement. On July 18, 2006, plaintiff sent defendant a letter stating that defendant’s estimated share of the cost was \$255,112.17, which did not include right-of-way costs or other costs that had accrued. Defendant and Bellemeade were concerned that this substantial increase in the estimated cost was because of an improper allocation of line items between the culvert work and the road work. They were also concerned about the addition of items to the estimates that they believed were not contemplated in the Agreement, such as plaintiff’s employees’ salaries and fringe benefits, as well as plaintiff’s overhead. On July 27, 2006, Bellemeade sent a letter to plaintiff raising concerns about the estimated cost of the project, as well as the timing of the project, i.e., it was being commenced, not completed, three years after the Agreement was signed. On August 7, 2006, plaintiff moved forward on the project by advertising for construction bids, which would determine the actual cost of the project.

On August 30, 2006, plaintiff sent defendant a letter stating that the low bid for the project was \$589,242.71. The letter referred to an attached “summary of costs” which indicated that defendant and Bellemeade’s share of the construction cost was \$248,849.47, each, but that did not include the preliminary engineering, right-of-way, and construction engineering costs. Plaintiff’s share of the cost totaled \$91,543.76. The “summary of costs” stated that Bellemeade and defendant’s share of the road work cost was \$237,758.85, each, and their share of the culvert cost was \$11,090.62, each. Plaintiff’s share of the road work cost was \$25,000 and its share of the culvert cost was \$66,543.76. Plaintiff’s “summary of costs” provided no information as to how the bidder arrived at these costs, i.e., it did not delineate specific line items or detail the specific allocated costs. Plaintiff’s letter also requested that defendant and Bellemeade “provide a written commitment to proceed with the project at the allotted costs no later than 3:00 p.m.” the next day. Bellemeade responded to plaintiff’s letter the same day, stating that the “summary does not provide the breakdown of costs per the agreement allocations” . . . and “we are unable to make a decision as to our portion.” Defendant also responded on the same day, stating that it would need approval from the school board in light of the cost increase for the project.

On September 1, 2006, defendant sent plaintiff a letter questioning both the delay of the project and the fact that the initial cost estimates were off by \$150,000. The letter stated: “We are committed to the Willis Road Improvement project, but question the three-year delay and the 50% increase in the cost to the district.” The letter concluded stating that plaintiff’s request would be placed on the school board agenda scheduled for September 11, 2006.

On September 7, 2006, plaintiff responded to defendant’s letter, acknowledging defendant’s concern about the cost increase and stating that it “was in the process of reviewing the history of this project and preparing a more detailed response to your concerns,” which was expected to be completed by the following week. The letter also said: “While we appreciate your offer to place this issue on the agenda for your Board’s September 11, 2006 meeting, we would like you to have the opportunity to review this information prior to a meeting with you and/or your Board.” The letter referenced Bellemeade’s refusal to commit to the project and stated that, unless Bellemeade committed by September 15, 2006, plaintiff would have to reject the construction bid and delay the project until spring or summer 2007, at which time it would have to be re-bid.

Plaintiff never provided the “detailed response” addressing defendant’s concerns. And, on September 15, 2006, when Bellemeade did not commit to the project, plaintiff unilaterally cancelled the project for the year without notifying defendant. In February 2007, the parties held a meeting regarding the road project but no agreement was reached. Although another meeting was supposed to be scheduled by plaintiff, it was never scheduled. When defendant’s superintendent questioned when the meeting was going to be held, McCulloch said the project was “off the books.” Defendant’s superintendent then told McCulloch that the bond funds held in escrow for the project would have to be reallocated and, on August 27, 2007, they were reallocated to fund school items.

On July 24, 2008—almost a year and one-half after defendant’s last meeting with plaintiff—defendant received a letter from plaintiff stating that it planned to construct the Willis road improvements in either 2010 or 2011. The letter further stated that “[t]he Agreement outlines the School District’s financial participation for the Willis Road Improvement project.”

By letter dated September 2, 2008, defendant advised plaintiff that, on August 25, 2008, the school board “resolved to rescind the Agreement dated August 11, 2003” pertaining to the Willis Road project.

On January 23, 2009, plaintiff filed this case. Plaintiff alleged that defendant breached the Agreement by refusing to perform when plaintiff notified defendant that it required funds for construction of the project per the Agreement. Plaintiff also sought a declaratory judgment to establish that plaintiff had the right to obtain from defendant its share of the actual cost of completing the project, although that cost was “unknown” and could be “considerably higher than the cost of the original contractor’s bid.”

Subsequently, defendant moved for summary disposition, arguing that there was no genuine issue of material fact that plaintiff breached the Agreement by not performing by the August 11, 2006 completion date; thus, defendant properly rescinded the Agreement and was entitled to summary dismissal of plaintiff’s claims. Plaintiff responded, arguing that defendant waived the deadline and then breached the Agreement by failing to commit the necessary funds on August 31, 2006. The trial court denied the motion.

Eventually a nine-day bench trial was held. On May 20, 2011, the trial court issued its six-page opinion and order. The trial court concluded that defendant was bound by the Agreement and that its actions constituted an anticipatory breach of the Agreement. The trial court further held that plaintiff did not commit a substantial breach of the Agreement by failing to complete the project by August 11, 2006; accordingly, defendant was not entitled to rescind the Agreement. Thus, the court held, defendant was obligated to pay its share of the actual cost of the improvements to Willis Road. The relief determined by the court to be “fair, equitable, practical and necessary” was: (1) a judgment in the amount of \$334,828.45 against defendant that represented “damages for unpaid out-of-pocket expenses to date, plus damages based on the 2006 low bid,” and (2) a declaratory judgment declaring that defendant breached the Agreement and was obligated to pay one-half of the actual cost of constructing the improvements “at whatever time the final actual costs can be determined.” Plaintiff was ordered to complete the improvements within 18 months after receipt of the sums awarded in the judgment, and the court retained jurisdiction for the purpose of enforcing its judgments. Thereafter, a judgment for money damages and a declaratory judgment was entered consistent with the trial court’s opinion and order. This appeal followed and, on June 22, 2011, this Court granted a stay of the trial court’s judgment.

On appeal, defendant challenges the trial court’s holdings that plaintiff did not commit a substantial breach of the Agreement entitling defendant to rescind the Agreement and that defendant’s actions constituted an anticipatory breach of the Agreement entitling plaintiff to money damages and a declaratory judgment. Defendant argues that the trial court’s factual findings are clearly erroneous because they are unsupported by the record evidence.

A trial court’s factual findings following a bench trial are reviewed for clear error and its conclusions of law are reviewed de novo. *Chelsea Inv Group, LLC v Chelsea*, 288 Mich App 239, 250; 792 NW2d 781 (2010). “A finding is clearly erroneous if there is no evidentiary support for it or if this Court is left with a definite and firm conviction that a mistake has been made. *Id.* at 251. Contract interpretation presents a question of law that we review de novo on

appeal. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002). The issue whether a breach of contract occurred presents a question of fact. *Detroit v Porath*, 271 Mich 42, 54-55; 260 NW 114 (1935); *State-William Partnership v Gale*, 169 Mich App 170, 176; 425 NW2d 756 (1988). And questions of law in declaratory judgment actions are reviewed de novo, but the trial court's decision to grant declaratory relief is reviewed for an abuse of discretion. *Guardian Environmental Servs, Inc v Bureau of Const Codes & Fire Safety*, 279 Mich App 1, 5-6; 755 NW2d 556 (2008).

Defendant argues that plaintiff committed the first substantial breach of the Agreement when it failed to complete the project by August 11, 2006, an explicit and material term of the Agreement, as evidenced by the time of the essence provision, which was never modified. Thus, plaintiff could not maintain or prevail on its breach of contract action against defendant for failing to commit to funding the road project after that completion date had passed and defendant was entitled to rescind the Agreement.

When a party commits a substantial breach of the contract at issue, that party cannot maintain an action against another party to the contract for failing to perform. *Able Demolition v Pontiac*, 275 Mich App 577, 585; 739 NW2d 696 (2007). A substantial breach of a contract also provides a basis for the non-breaching party to rescind the contract. *Rosenthal v Triangle Dev Co*, 261 Mich 462, 463-464; 246 NW 182 (1933); *Adell Broadcasting v Apex Media Sales*, 269 Mich App 6, 13-14; 708 NW2d 778 (2005). Plaintiff argues here, however, that it did not commit a substantial breach of the Agreement because defendant waived the completion date term of August 11, 2006, as evidenced by the facts that defendant never mentioned it until September 1, 2006, and then wrote plaintiff that it remained "committed" to the road improvement project.

In *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362; 666 NW2d 251 (2003), our Supreme Court held: "[I]t is well established in our law that contracts with written modification or anti-waiver clauses can be modified or waived notwithstanding their restrictive amendment clauses. This is because the parties possess, and never cease to possess, the freedom to contract even after the original contract has been executed." *Id.* at 372. However, a unilateral modification is not permitted, i.e., there must be mutual assent. *Id.* Thus, when a party alleges that a contract provision has been waived or that the contract was modified, that party "must establish a mutual intention of the parties to waive or modify the original contract." *Id.* "The mutuality requirement is satisfied where a modification is established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to waive the terms of the original contract." *Id.* at 373.

Plaintiff argues in this case that defendant's affirmative conduct established its agreement to waive the completion date term of August 11, 2006. To satisfy the mutuality requirement when a party's course of conduct is the alleged basis for modification, it must be established by clear and convincing evidence that the contracting party, relying on the terms of the prior contract, knowingly waived enforcement of the terms. *Id.* at 374. Further, when the contract includes written modification or anti-waiver clauses, "[a]ny clear and convincing evidence of conduct must overcome not only the substantive portions of the previous contract allegedly amended, but also the parties' express statements regarding their own ground rules for modification or waiver as reflected in any restrictive amendment clauses." *Id.* at 374-375.

The Agreement included the following provisions:

6. Completion Date. The WCRC agrees to complete the Willis Road Improvements and within three (3) years of the execution of this Agreement.

* * *

10. Time of the Essence. Time is of the essence of all undertakings and agreements of the parties hereto.

11. Amendment. This Agreement may not be modified, replaced, amended, or terminated without the prior written consent of the parties to this Agreement.

To prove its claim of waiver, plaintiff had to establish by clear and convincing evidence that defendant, relying on the Completion Date, Time of the Essence, and Amendment terms, knowingly waived enforcement of those terms. “[W]aiver is a voluntary and intentional abandonment of a known right.” *Id.* at 374. Mere silence is not sufficient to establish a waiver, *id.* at 377, but it may amount to a forfeiture which “is the failure to assert a right in a timely fashion.” *Id.* at 379.

Plaintiff argues that defendant knew that work on the project did not begin until August 2005, two years after the Agreement was executed. And defendant was apprised of the problems plaintiff encountered, including with a utility company and the Drain Commissioner which were not resolved until June and July of 2006. The successful resolution of these problems, plaintiff argues, saved defendant money but prevented plaintiff from completing the project by August 11, 2006. Further, defendant knew “in the spring that circumstances were making it impossible to finish construction by” that deadline. Despite this knowledge, plaintiff argues, defendant “made no mention whatsoever of the ‘deadline’ until September 1, 2006,” when it sent plaintiff a letter. And in that same letter defendant stated that it was “committed to the Willis Road improvement project.” Further, an attorney sent a letter on September 13, 2006,³ which stated that defendant expressed its “commitment to the project.” We conclude that this evidence plaintiff relies on in support of its claim of waiver is not clear and convincing and did not succeed in “overcom[ing] not only the substantive portions of the previous contract allegedly amended, but also the parties’ express statements regarding their own ground rules for modification or waiver as reflected in any restrictive amendment clauses.” *Id.* at 374-375.

The clear and convincing evidentiary standard is the most demanding standard applied in civil cases. *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995).

³ In its appeal brief plaintiff states that the letter was dated September 13, 2008, but it was dated September 13, 2006.

Evidence is clear and convincing when it

“produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.” . . . Evidence may be uncontroverted, and yet not be “clear and convincing.” . . . Conversely, evidence may be “clear and convincing” despite the fact that it has been contradicted. [*Id.*, quoting *In re Jobes*, 108 NJ 394, 407-408; 529 A2d 434 (1987).]

Plaintiff’s claim of waiver relies in large part on the mere fact that defendant knew about plaintiff’s activities and knew at some point that the project would not be completed by August 11, 2006, yet it remained silent until after the date had passed. But plaintiff fails to cite any legal authority supporting its apparent claim that defendant had a duty to advise or remind plaintiff that the contract deadline was approaching. Further, plaintiff has presented no legal authority supporting its apparent claim that silence can constitute clear and convincing evidence sufficient to overcome express contract terms. Plaintiff’s reliance on *Al-Oil, Inc v Pranger*, 365 Mich 46; 112 NW2d 99 (1961), in support of its argument is misplaced. The contract at issue in that case did not include a definite time of performance and did not “specifically provide that time of performance should be regarded as of the essence of the agreement.” *Id.* at 52.

Our Supreme Court, in *Quality Prod & Concepts Co*, considered, and rejected, the argument that silence alone is sufficient to overcome express contract terms, holding:

Plaintiff’s proofs rest on the mere fact that defendant knew about plaintiff’s activity inconsistent with the contract and remained silent. Plaintiff has submitted no evidence of representations or affirmative conduct by defendant that it was intentionally and voluntarily relinquishing its right to confine the parties’ relationship to the terms of the contract and thus demand strict adherence to the [provisions] in the contract. [*Quality Prod & Concepts Co*, 469 Mich at 377.]

In conclusion, the Court held:

Simply put, the parties agreed to the terms of their written contract. Nevertheless, plaintiff seeks to be rewarded for proceeding in direct contradiction to the contract and in the face of the contract’s written modification and anti-waiver provisions on no basis other than that defendant was aware of plaintiff’s activities. There is no evidence that defendant affirmatively accepted plaintiff’s activities as a modification of the original contract.

In order to find for plaintiff on the facts presented, this Court must refuse to give effect to the express agreement of the parties without clear and convincing evidence of subsequent bilateral consent to alter the existing bilateral agreement. In other words, this Court would have to allow plaintiff to unilaterally modify a bilateral agreement *and*, in addition, do so in the face of contractual terms that precisely prohibit unilateral modification on the basis of no more than the defendant’s knowing silence. Our obligation to respect and enforce the parties’

unambiguous contract absent mutual assent to modify that contract precludes us from doing so. [*Id.* at 379-380.]

Accordingly, in this case, the fact that defendant knew plaintiff's activity was inconsistent with the Agreement's terms and remained silent amounts only to a forfeiture of contract rights, not a waiver of express contract terms. See *id.* at 377.

Further, the two letters that expressed defendant's "commitment" to the road improvement project after the completion date had passed are not clear and convincing evidence of an intent to waive the express terms of the Agreement. Although defendant stated that it was "committed" to the project, defendant did not state that it considered itself bound by the Agreement after the completion date had passed. We will not infer a knowing and intentional waiver of express contract provisions from this ambiguous language. The potential for ambiguous acts being construed as waiver by conduct is the reason parties often include a written modification provision; "to protect against unintended and unilateral modification or waiver." *Id.* at 373 n 5. In fact, defendant's superintendent, who wrote one of the letters, testified that he believed once the completion date had passed, the terms of any new Agreement were negotiable.

In summary, plaintiff alleged that defendant's course of conduct was the basis for modification. Therefore, to satisfy the mutuality requirement, plaintiff had to establish by clear and convincing evidence that defendant, relying on the terms of the prior contract, knowingly and intentionally waived enforcement of the terms of the Agreement. Plaintiff failed to carry this burden. That is, the evidence relied upon by plaintiff is not so clear, direct, weighty, and convincing to produce in the mind of the trier of fact a firm belief or conviction, without hesitation, that defendant knowingly and intentionally waived enforcement of the completion date, time of the essence, and written modification terms of the Agreement. See *In re Martin*, 450 Mich at 227.

Although unclear, it appears that the trial court was persuaded by plaintiff's argument that defendant waived enforcement of the Agreement's express terms, holding as follows:

The "time is of the essence" language that Defendants rely on was more boilerplate in nature than essential language of the agreement. Defendants' use of it as an excuse for not paying is questionable both in timing and in motive.

The Defendants never mentioned the delay between August 11, 2003 and July 27, 2006. Defendants knew for months that the job could not be completed by August 11, 2006. As late as July 26, 2006, August 31, 2006 and September 13, 2006 Defendants stated in writing that they remained "committed" to the road improvement project. It was only when it was time to bid the project that would require payment by Defendants that they raised "concerns" about delays.

The rules of contract interpretation are well-established that: (1) the goal of contract interpretation is to determine and enforce the intent of the parties, as expressed in the contract, *Shay v Aldrich*, 487 Mich 648, 660; 790 NW2d 629 (2010), (2) a "contract must be interpreted according to its plain and ordinary meaning," *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008), and (3) clear and unambiguous contractual language must be enforced as

written, *Holland v Trinity Health Care Corp*, 287 Mich App 524, 527; 791 NW2d 724 (2010). Another rule of contract interpretation is that courts must “give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory.” *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

Here, the trial court failed to abide by these well-established rules of contract construction when it held that the time of the essence provision was merely “boilerplate in nature.” The judiciary is not authorized to rewrite contracts by failing to enforce unambiguous terms as explained by our Supreme Court in *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005): “We reiterate that the judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of ‘reasonableness’ as a basis upon which courts may refuse to enforce unambiguous contractual provisions.” *Id.* at 461. Further, as discussed above, defendant’s silence and ambiguous statements do not constitute clear and convincing evidence sufficient to establish that defendant waived enforcement of the Agreement’s unambiguous terms. Accordingly, the trial court’s apparent holding that defendant waived strict enforcement of the Agreement’s terms, including the completion date term, is reversed.

Defendant also challenges as clearly erroneous the trial court’s holding that its actions constituted an anticipatory breach of the Agreement. In that regard, the trial court found that defendant’s “actions and words clearly indicated that [it] could not be counted on to honor [its] word.” The trial court noted that defendant “renege[d]” on its promise to pay actual costs “when it came time to accept bids for the improvement.” Thus, the trial court held, defendant’s “actions constitute anticipatory breach and Plaintiff appropriately sought enforcement through the court.” After review of the record evidence, we agree with defendant that the trial court’s factual findings are clearly erroneous.

“Under the doctrine of repudiation or anticipatory breach, if, before the time of performance, a party to a contract unequivocally declares the intent not to perform, the innocent party has the option to either sue immediately for the breach of contract or wait until the time of performance.” *Stoddard v Mfr Nat’l Bank of Grand Rapids*, 234 Mich App 140, 163; 593 NW2d 630 (1999). In this case, defendant never unequivocally declared its intention not to perform before the time of performance was due. The undisputed evidence illustrated, at minimum, that prior to August 11, 2006, defendant escrowed the necessary bond funds to finance its share of the project, was responsive to all discussions initiated by plaintiff, fully agreed to revise its project plans pertaining to rerouting its driveways, and assisted plaintiff with resolving the utility pole relocation issue. While the cost of the project was certainly a concern of defendant, and defendant voiced that concern, defendant never gave any indication to plaintiff, prior to August 11, 2006, that it was not going to pay its share of those costs. And on appeal, plaintiff fails to reference evidence of any action by defendant that could be construed an unequivocal declaration of defendant’s intent not to perform before the time of performance was required

under the Agreement.⁴ Accordingly, we conclude that the trial court's holding that defendant's actions constituted an anticipatory breach of the Agreement is clearly erroneous and it is reversed.

Defendant also argues that plaintiff committed the first substantial breach of the Agreement by failing to complete the road improvement project by August 11, 2006, an explicit, unmodified, and material term of the Agreement as evidenced by the time of the essence provision. We agree. This Court explained in *Woody v Tamer*, 158 Mich App 764, 771; 405 NW2d 213 (1987), quoting 2 Restatement Contracts, 2d, § 235, p 211: "When performance of a duty under a contract is due any non-performance is a breach." Further, "[w]hen performance is due . . . anything short of full performance is a breach, even if the party who does not fully perform was not at fault and even if the defect in his performance was not substantial." *Woody*, 158 Mich App at 772, quoting 2 Restatement Contracts, 2d, § 235, Comment b, p 212. Here, the Agreement provided that plaintiff "agrees to complete the Willis Road Improvements and within three (3) years of execution of this Agreement." As discussed above, defendant did not waive this term of the Agreement, this term was never modified by written agreement, and it is undisputed that the Willis Road improvements were not completed; thus, plaintiff breached the Agreement.

In determining whether plaintiff's breach of the Agreement was a substantial breach we look to the language of the Agreement. In that regard we are mindful that contracts are to be read as a whole and various parts should be read together with meaning given to all of its terms. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 50 n 11; 664 NW2d 776 (2003). Here, the Completion Date provision of the Agreement sets forth plaintiff's duty, or promise, to complete the road improvements within three years of the execution of the Agreement. The Payment Schedule provision of the Agreement sets forth defendant's duties, or promises (1) to deliver payment of its respective share of the engineering cost "promptly" to plaintiff, and (2) to deliver payment of its respective share of the construction cost to plaintiff within thirty days of receipt of written notice that a contractor has been selected. As discussed above, the Agreement also included a Time of the Essence provision which provided: "Time is of the essence of all undertakings and agreements of the parties hereto." These unambiguous provisions are reflective of the parties' intent to make the issue of time a material term of the Agreement and must be enforced as written. See *Quality Prod & Concepts Co*, 469 Mich at 375; *Holland*, 287 Mich App at 527. We also note that Paragraph 4 of the Agreement contemplates a fairly aggressive timing schedule of the project, providing: "It is anticipated that engineering work will be bid and performed within twelve months of the date of this Agreement, and that

⁴ Defendant's, as well as the trial court's, reference to an email that defendant's superintendent sent to Bellemeade on August 30, 2006, stating that he hoped "the whole thing gets canned," meaning the project, is irrelevant to the issue whether defendant unequivocally declared its intention to plaintiff not to perform before the time of performance was due. Clearly, this email was sent only to Bellemeade, not plaintiff, and it was sent after the completion date set forth in the Agreement, August 11, 2006, had passed. See *Paul v Bogle*, 193 Mich App 479, 493; 484 NW2d 728 (1992).

construction work will be bid and performed the following year.” Although the language in Paragraph 4 does not present a binding commitment, it is further illustrative of the parties’ intent to make the issue of time a material term of the Agreement.

In light of the clear and unambiguous language of the Agreement, considered as a whole, we conclude that plaintiff’s failure to complete the road improvements by August 11, 2006, as set forth in the Agreement, constituted a substantial breach of the Agreement. The failure to perform a substantial part of a contract or one of its essential terms is considered a “substantial breach.” *Rosenthal*, 261 Mich at 463; see, also, *Holtzlander v Brownell*, 182 Mich App 716, 721; 453 NW2d 295 (1990). Timely performance was expressly made an essential term of the Agreement as evidenced by the inclusion of both a definite time in which plaintiff was to complete the improvements, as well as a time of the essence provision. “If time is of the essence, a performance after the time fixed does not bind the other party unless he waives the breach, and thereby, in effect, makes a new contract taking the place of the old one.” *Jones v Berkey*, 181 Mich 472, 479; 148 NW 375 (1914) (citation omitted). As discussed above, defendant did not waive “the breach.” Because plaintiff failed to complete the road improvement project by August 11, 2006, defendant did not obtain the benefit it reasonably expected to receive. See *Holtzlander*, 182 Mich App at 722. Thus, plaintiff’s failure to complete the improvements by August 11, 2006, constituted a material breach of the Agreement which relieved defendant from any further duty to perform. And plaintiff’s performance after August 11, 2006, did not bind defendant to any further performance under the Agreement. Accordingly, plaintiff could not maintain a breach of contract action against defendant.

We also note and reject as clearly erroneous the trial court’s findings of fact that plaintiff did not commit a substantial breach of the Agreement because: (1) the delay inured to defendant’s benefit since defendant received its access permit while its obligation to pay was forestalled, and (2) the delay was caused in large part by intervening forces, i.e., third parties, not related to any of the parties’ actions. Even if true, these considerations do not excuse plaintiff’s duty to perform its contractual obligations consistent with the explicit, material terms of the Agreement.⁵ But, in any case, the record evidence included that defendant did not receive an access permit from plaintiff for its planned improvements contemplated by the Agreement and defendant intended that the project be completed at the same time as its campus expansion. And the fact that defendant’s financial obligations were “forestalled” may not have inured to defendant’s benefit because of inflationary influences causing an increase in the construction costs.⁶ Further, it was plaintiff’s own two-year delay in beginning the project that caused it to

⁵ If a contract is unclear as to its “material” terms, other factors are appropriate considerations in the determination whether a party’s breach was “material.” See, e.g., *Omnicom of Mich v Giannetti Inv Co*, 221 Mich App 341, 348; 561 NW2d 138 (1997).

⁶ The record evidence included that the cost of road projects is significantly influenced by oil prices and plaintiff’s complaint clearly acknowledged inflationary influences when it requested costs that were “unknown” and which could be “considerably higher than the cost of the original contractor’s bid.” Further, in its brief on appeal, plaintiff states: “Evidence at trial showed that road construction costs have risen since 2006.”

have insufficient time to resolve the problems it encountered with the utility company, Drain Commissioner, and right-of-way acquisitions and still complete the project by the date set forth in the Agreement, August 11, 2006. The only explanation for plaintiff's delay in beginning the project was that plaintiff was "extremely busy" and federal aid projects are a "higher priority." However, plaintiff had three years to complete the road improvements set forth in the Agreement, a project that plaintiff's employee estimated would take a year from start to finish and 60 days from bid opening to completion.

It also appears that the trial court relied on *Cooper v Klopfenstein*, 29 Mich App 569; 185 NW2d 604 (1971), in support of its holding that plaintiff's breach was not a substantial breach. That case is factually distinguishable. The contract at issue in *Cooper* did not include a date certain for performance, although it did include a time of the essence provision. *Id.* at 572. Accordingly, the *Cooper* Court held, consistent with prevailing law, that when a date certain is not stated in a contract, the parties are expected to perform within a reasonable time. *Id.* at 574. In this case, the Agreement included a date certain by which plaintiff was to complete the project, as well as a time of the essence provision. A court is not entitled to rewrite the parties' contract to import a "reasonable" time provision contrary to the clear intentions of the contracting parties. As our Supreme Court held in *Wilkie*, 469 Mich at 51: "This approach, where judges divine the parties' reasonable expectations and then rewrite the contract accordingly, is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy."

In summary, we conclude that plaintiff's failure to complete the road improvements by August 11, 2006, constituted "a material breach affecting a substantial or essential part of the contract." *Holtzlander*, 182 Mich App at 721. Defendant's actions did not constitute an anticipatory breach of the Agreement. And because plaintiff committed the first substantial breach of the Agreement, it was not permitted to maintain a breach of contract action against defendant for failing to commit to funding the road improvements after the completion date had passed. See *Able Demolition*, 275 Mich App at 585. Therefore, the trial court's opinion and order awarding plaintiff \$334,828.45 in money damages on its breach of contract claim against defendant is reversed. The trial court's opinion and order granting plaintiff's request for declaratory judgment, premised on its holdings that: defendant was bound by the Agreement, defendant breached the Agreement, plaintiff did not commit a substantial breach of the Agreement, and defendant was obligated to pay its one-half share of the actual cost of the project, is reversed. Accordingly, the trial court's judgment for money damages and declaratory judgment entered in favor of plaintiff and against defendant is vacated and this matter is remanded to the trial court for entry of a judgment in favor of defendant consistent with this opinion.

The trial court properly held, however, that defendant was not entitled to rescind the Agreement, contrary to defendant's claim on appeal. A party must invoke its right to rescind a contract promptly. *Schnepf v Thomas L McNamara, Inc*, 354 Mich 393, 397; 93 NW2d 230 (1958). In this case, when it appeared to defendant that plaintiff would not be able to complete the project by the completion date set forth in the Agreement, defendant remained silent. Even after the completion date passed, defendant remained silent. In fact, defendant did not give plaintiff notice of its "rescission" of the Agreement until September 2, 2008, when defendant

advised plaintiff that, on August 25, 2008, the school board “resolved to rescind the Agreement dated August 11, 2003.” As discussed above, while silence is insufficient to establish waiver of express contract terms, silence is sufficient to establish forfeiture of a legal right. *Quality Prod & Concepts Co*, 469 Mich at 379. In this case, defendant forfeited its right of rescission premised on plaintiff’s failure to timely perform. In *Lash v Allstate Ins Co*, 210 Mich App 98; 532 NW2d 869 (1995), this Court discussed the consequence of contract rescission as follows:

To rescind a contract is not merely to terminate it, but to abrogate and undo it from the beginning; that is, not merely to release the parties from further obligation to each other in respect to the subject of the contract, but to annul the contract and restore the parties to the relative positions which they would have occupied if no such contract had ever been made. Rescission necessarily involves a repudiation of the contract and a refusal of the moving party to be further bound by it. But this by itself would constitute no more than a breach of contract or a refusal of performance, while the idea of rescission involves the additional and distinguishing element of a restoration of the status quo. [*Id.* at 102-103, quoting *Cunningham v Citizens Ins Co of America*, 133 Mich App 471, 479; 350 NW2d 283 (1984).]

Under the circumstances of this case, plaintiff’s substantial breach of the Agreement discharged defendant’s duty of performance under the Agreement. However, if defendant wanted to be restored to the position it would have occupied if no such contract had ever been made, i.e., “the status quo,” defendant was required to promptly move for rescission of the Agreement. Thus, we affirm the trial court’s holding that defendant was not entitled to rescind the Agreement, albeit for a different reason. See *Mulholland v DEC Int’l Corp*, 432 Mich 395, 411 n 10; 443 NW2d 340 (1989).

Reversed in part, affirmed in part, and the judgment for money damages and declaratory judgment in favor of plaintiff and against defendant is vacated in its entirety. This matter is remanded to the trial court for entry of a judgment in favor of defendant consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood